

NO. PD-0202-19

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
5/27/2021
DEANA WILLIAMSON, CLERK

ALBERTO MONTELONGO

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

THE STATE'S MOTION FOR REHEARING

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-16-00001-CR
TRIAL COURT CAUSE NUMBER 20150D02224
243rd DISTRICT COURT OF EL PASO COUNTY, TEXAS**

**YVONNE ROSALES
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT**

**TOM A. DARNOLD
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 3403
FAX (915) 533-5520
E-MAIL: tdarnold@epcounty.com
SBN 00787327**

ATTORNEYS FOR THE STATE

THE STATE’S GROUNDS FOR REHEARING

Ground One: This Court failed to address the State’s argument, raised in both the Court of Appeals and this Court, that the courts of this State (including this Court) have implicitly recognized and applied an exception (and addition) to the general error-preservation requirements of rule 33.1(a) in the particular factual context of this case.

Ground Two: Even under a straightforward application of the general error-preservation requirements of rule 33.1(a), Montelongo failed to preserve his complaint for appellate review.

I. Underlying facts and procedural history

The relevant facts are succinctly set out in the first paragraph of this Court’s published opinion on original submission:

Appellant, Alberto Montelongo, timely filed and presented a motion for new trial in which he requested a hearing. The trial court initially scheduled a hearing, but it later *sua sponte* cancelled the hearing without rescheduling. No hearing was held, the trial court made no rulings on the motion, and the motion was overruled by operation of law.

Montelongo v. State, ___ S.W.3d ___, No. PD-0202-19, slip op. at 1

(Tex.Crim.App., May 12, 2021)(not yet reported)(hereinafter *Montelongo II*).

On appeal, Montelongo complained that the trial court abused its discretion by failing to hold a hearing on his motion for new trial. But the Eighth Court of Appeals, agreeing with the State’s arguments, held that when a motion for new trial is timely filed and presented to the trial court, the burden of ensuring that a

hearing thereon is timely held is on the party filing and presenting the motion, not on the trial court. *See Montelongo v. State*, No. 08-16-00001-CR, 2018 WL 4178520, at *2 (Tex.App.–El Paso, Aug. 31, 2018)(not designated for publication)(hereinafter *Montelongo I*), *citing, e.g., Crowell v. State*, 949 S.W.2d 37, 38 (Tex.App.–San Antonio 1997, no pet.). The Eighth Court, again agreeing with the State’s arguments, therefore held, under the error-preservation requirements of rule 33.1(a) of the Texas Rules of Appellate Procedure, that because the record showed that Montelongo made no efforts to reschedule the hearing on his motion for new trial or did not otherwise object to the trial court’s cancellation of the hearing, he (Montelongo) failed to preserve his complaint regarding the trial court’s failure to conduct a hearing on the motion. *See Montelongo I*, 2018 WL 4178520, at *2-3, *citing, e.g., Baker v. State*, 956 S.W.2d 19, 24-25 (Tex.Crim.App. 1997), and *Tello v. State*, 138 S.W.3d 487, 496 (Tex.App.–Houston [14th Dist.] 2004), *aff’d*, 180 S.W.3d 150 (Tex.Crim.App. 2005).

This Court granted Montelongo’s petition for discretionary review (PDR) of this holding by the Eighth Court. In analyzing this error-preservation issue, this Court first noted that error-preservation under rule 33.1(a) of the Texas Rules of Appellate Procedure normally requires a timely objection and a ruling by the trial

court. *See Montelongo II*, slip op. at 3. To be timely, such objection must be made as soon as the ground for the complaint is—or should be—apparent, and the objection must let the trial court know what the party wants and be made at a time when the trial court is in a position to do something about it. *See id.*, slip op. at 3-4.

In answering the question of when must the objection be made to preserve for appeal the issue of a trial court's failure to hold a hearing on a motion for new trial, this Court held that the grounds for such objection become apparent only when the motion for new trial has been overruled by operation of law, that is, when the 75-day period for ruling on the motion has expired. *See id.*, slip op. at 4-5; *see also* TEX. R. APP. P. 21.8. Thus, the grounds for such objection do not become apparent until the trial court has lost jurisdiction over the motion for new trial and therefore cannot hold a hearing on the motion. *See Montelongo II*, slip op. at 5. Consequently, because the issue arises at a time when the trial court loses jurisdiction over the motion for new trial, a contemporaneous objection is not necessary to preserve the issue of the trial court's failure to hold a hearing on the motion, and the issue is preserved once the defendant timely files and presents to the trial court a motion for new trial that requests a hearing, as that satisfies the rule 33.1(a) requirement of letting the trial court know what the defendant wants at

a time when the court is in a position to do something about it (specifically, setting and conducting a hearing on the motion). *See id.*, slip op at 5-7. In this case, then, under this Court’s straightforward application of the general rule 33.1(a) requirements, because Montelongo timely filed and presented to the trial court a motion for new trial requesting a hearing, he preserved for appellate review the issue of whether the trial court abused its discretion by failing to conduct a hearing on the motion, and Montelongo’s failure to attempt to have the cancelled hearing rescheduled or otherwise object to the cancellation of the hearing was irrelevant to the error-preservation analysis. *See id.*, slip op. at 7-8.

II. Ground One: This Court failed to address the State’s argument, raised in both the Court of Appeals and this Court, that the courts of this State (including this Court) have implicitly recognized and applied an exception (and addition) to the general error-preservation requirements of rule 33.1(a) in the particular factual context of this case.

In its brief on PDR, the State argued that the courts of this State, including this Court, have recognized and applied an exception (or addition) to the general error-preservation requirements of rule 33.1(a) in the particular factual context of this case, that is, when the trial court either sets an untimely hearing on the motion for new trial (outside the 75-day window for ruling on the motion) or cancels or fails to conclude an otherwise timely set hearing. In such situation, as is presented in this case and as the State argued in its PDR brief (and as the Eighth Court of

Appeals so recognized), the defendant's initial filing and presentment of the motion for new trial, along with a request for a hearing, is not sufficient—under rule 33.1(a)—to preserve for review a complaint regarding the trial court's failure to hold a hearing on the motion. Rather, because the burden is on the defendant to ensure that a hearing is set and actually held before the expiration of the 75-day window for ruling on the motion, in order to preserve a complaint regarding the trial court's failure to hold a hearing on the motion, the defendant must object to the trial court's failure to set the motion for a timely hearing, or, if a hearing is initially timely set but later cancelled, object to such cancellation or otherwise attempt to have the hearing timely rescheduled. *See, e.g., Baker v. State*, 956 S.W.2d at 24-25 (where this Court, in applying the substantively identical predecessor to rule 33.1(a), held that by failing to object to the trial court's untimely setting of the motion-for-new-trial hearing, the defendant failed to preserve his complaint regarding the trial court's failure to hold a timely hearing on the motion); *Tello v. State*, 138 S.W.3d at 496 (holding that where, as in this case, a timely hearing on the defendant's motion for new trial was initially set, but then cancelled by the trial court, the defendant failed to preserve his complaint that the trial court failed to hold a hearing on the motion, where the record showed that the defendant failed to object to the cancellation or otherwise take any steps to

attempt to have the cancelled hearing rescheduled); *Crowell v. State*, 949 S.W.2d at 38 (citing this Court's holding in *Baker* and similarly concluding that because the defendant did not object to the untimely setting of the hearing on the motion for new trial, she failed to preserve for review her complaint that the trial court failed to hold a timely hearing on the motion); *see also Bacey v. State*, 990 S.W.2d 319, 335 (Tex.App.–Texarkana 1999, pet. ref'd)(citing *Baker* and *Crowell* and reaching the same conclusion); *Lara v. State*, No. 01-15-00472-CR, 2016 WL 2342769, at *2-4 (Tex.App.–Houston [1st Dist.], May 3, 2016, no pet.)(mem. op.)(not designated for publication)(citing *Baker*, *Crowell*, and *Bacey* and likewise reaching the same conclusion).

Although the Eighth Court of Appeals cited and followed this *Baker/Tello/Crowell* line of cases and similarly recognized and applied this exception (or addition) to the general error-preservation requirements of rule 33.1(a), and although the State cited these cases in its PDR brief and urged the application of this recognized exception (or addition) to the general rule 33.1(a) requirements, this Court, in its opinion on original submission, did not address this argument by the State (or the Eighth Court of Appeals' holding thereon). Rather, after noting the State's argument urging application of this exception, this Court merely purported to apply the general error-preservation requirements of rule

33.1(a) without explanation of how or why the previously recognized exception (or addition) to those requirements did not apply in this factually indistinguishable context. *See Carsner v. State*, 444 S.W.3d 1, 4 (Tex.Crim.App. 2014)(“As a general proposition, reviewing courts ought to mention a party’s number one argument and explain why it does not have the persuasive force that the party thinks it does.”), *citing Sims v. State*, 99 S.W.3d 600, 603 (Tex.Crim.App. 2003). As such, this Court should grant this motion for rehearing, apply this recognized exception (or addition) to the general error-preservation requirements of rule 33.1(a), and hold that by failing to object to the trial court’s cancellation of the hearing or otherwise failing to attempt to have the hearing timely rescheduled, Montelongo failed to preserve for appellate review his complaint regarding the trial court’s failure to hold a hearing on his motion for new trial.¹

III. Ground Two: Even under a straightforward application of the general error-preservation requirements of rule 33.1(a), Montelongo failed to preserve his complaint for appellate review.

Even if this Court declines to apply the exception (or addition) to the general error-preservation requirements of rule 33.1(a), as previously recognized

¹ At the very least, if this Court intends to overrule the *Baker/Tello/Crowell* line of cases, which the Court’s opinion on original submission certainly purports to do by implication, it should do so expressly.

in the *Baker/Tello/Crowell* line of cases, Montelongo still failed to preserve his complaint for appellate review under a straightforward application of the rule 33.1(a) requirements. As this Court held on original submission, rule 33.1(a) requires that a complaint be made at the earliest opportunity or as soon as the grounds for the complaint are, or should be, apparent, and the complaint must be made when the trial court is in a position to do something about it. *See Montelongo II*, slip op. at 3-5. The State has no quarrel with this holding.

But this Court then held that the grounds for this particular complaint, namely, the trial court's failure to hold a hearing on a timely filed and presented motion for new trial, become apparent only upon expiration of the 75-day period for ruling on the motion, as the court cannot be said to have "failed" to hold a hearing until that time. *See id.*, slip op. at 4-7. The State would have no quarrel with this holding in a situation where no hearing was ever set by the trial court, as in such situation, the court has not indicated—one way or the other—whether it intends to hold a timely hearing on the motion.

However, in the particular factual context of this case, where the trial court initially set a timely hearing but then cancelled that hearing without rescheduling, the court has—at the time of the cancellation of the hearing—indicated its intent to not hold a timely hearing on the motion. As such, the grounds for the defendant's

complaint regarding the failure to hold a hearing become apparent, or should be apparent, at the time the trial court cancels the hearing. And because the grounds for the defendant's complaint are (or should be) apparent at the time of the cancellation, and because the trial court is still in a position at that time to do something to ameliorate the complaint (namely, reschedule the hearing), it is incumbent upon the defendant at that time—under the general error-preservation requirements of rule 33.1(a)—to object to the cancellation, attempt to get the hearing rescheduled, or otherwise bring the issue to the court's attention.

Simply, in this case, Montelongo was expressly put on notice that the trial court had changed its mind about setting and conducting a timely hearing on the motion for new trial, and absent a record showing that Montelongo objected to that cancellation or otherwise attempted to get the hearing rescheduled, any reviewing court, including this Court, is left to speculate as to whether Montelongo acquiesced in that cancellation or wanted the hearing to be rescheduled. Under a straightforward application of rule 33.1(a), then, it was incumbent upon Montelongo to somehow communicate to the trial court that he objected to the cancellation and/or wanted the hearing to be rescheduled. The record in this case shows no such communication or objection by Montelongo. Consequently, under the general error-preservation requirements of rule 33.1(a),

Montelongo failed to preserve for review his complaint that the trial court failed to hold a hearing on his motion for new trial. *See Baker v. State*, 956 S.W.2d at 24-25.² This Court should therefore grant rehearing and hold that Montelongo failed to preserve for appellate review his complaint regarding the trial court's failure to hold a hearing on his motion for new trial.

PRAYER

WHEREFORE, the State prays that this Court grant the State's Motion for Rehearing, and that upon such rehearing: (1) address the State's argument that under the particular factual context of this case, the previously recognized exception (or addition) to the general error-preservation requirements of rule 33.1(a) applies, such that Montelongo failed to preserve for appellate review his complaint regarding the trial court's failure to hold a hearing on his motion for new trial; or (2), in the alternative, conclude that even under a straightforward application of the general error-preservation requirements of rule 33.1(a), Montelongo failed to preserve for appellate review his complaint regarding the trial court's failure to hold a hearing on his motion for new trial by failing to

² Although *Baker*, as well as the *Crowell*, *Bacey*, and *Lara* cases cited above, involves a situation where the trial court set a hearing outside the 75-day period for ruling on the motion, and not a situation (as in this case) where an initially timely set motion was cancelled, that is a distinction without a difference in this rule 33.1(a) analysis. Whether the hearing was cancelled or set outside 75-day window, the effect is same: the trial court has shown its intent not to hold a timely hearing.

object to the trial court's cancellation of the timely set hearing on the motion for new trial or otherwise attempting to get the hearing rescheduled.

Respectfully submitted,

YVONNE ROSALES
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/ Tom A. Darnold

TOM A. DARNOLD
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 3403
FAX (915) 533-5520
E-MAIL: tdarnold@epcounty.com
SBN 00787327

ATTORNEYS FOR THE STATE

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 2,807 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Tom A. Darnold

TOM A. DARNOLD

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that a copy of the foregoing motion for rehearing was sent by e-mail by utilizing the E-serve system on May 27, 2021, to appellant's attorney: Joe A. Spencer, at joe@joespencerlaw.com.

(2) The undersigned also does hereby certify that a copy of the foregoing motion for rehearing was sent by e-mail by utilizing the E-serve system on May 27, 2021, to the State Prosecuting Attorney: information@SPA.texas.gov.

/s/ Tom A. Darnold

TOM A. DARNOLD

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Tom Darnold
Bar No. 00787327
tdarnold@epcounty.com
Envelope ID: 53875300
Status as of 5/27/2021 12:18 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Joe A. Spencer		joe@joespencerlaw.com	5/27/2021 11:57:01 AM	SENT
State ProsecutingAttorney		information@SPA.texas.gov	5/27/2021 11:57:01 AM	SENT